

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION & ANOR [2018] FCCA 161

Catchwords:

MIGRATION – Partner residence visa – Tribunal finding no genuine relationship – applicant and sponsoring spouse married – sponsor in jail for majority of marriage – claims 1.15A of the *Migration Regulations 1994* – definition of spouse in s.5F of the *Migration Act 1958*.

Legislation:

Migration Act 1958 (Cth), s.5F

Migration Regulations 1994 (Cth), cl.1.15A, reg.801.221

Cases cited:

ACX15 v Minister for Immigration and Border Protection (2017) 322 FLR 247

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27

BCF15 v Minister for Immigration and Border Protection [2016] FCCA 2340

Carr v Western Australia (2007) 232 CLR 138

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1

Commissioner of State Revenue v Kimiora (2016) 309 FLR 266

Cooper Brooks (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297

Deputy Commissioner of Taxation v Webb (2017) 320 FLR 371

Director of Public Prosecutions for Victoria v Le (2007) 232 CLR 562

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309

Minister for Lands (NSW) v Jeremias (1917) 23 CLR 322

MZANX v Minister for Immigration and Border Protection (2016) 314 FLR 461

Northern Territory v Collins (2008) 235 CLR 619

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

R v Berchet [1794] EngR 1806

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (2001) 207 CLR 72

Southwest Water Authority v Rumble's [1985] AC 609

Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193

Taylor v Public Service Board (NSW) (1976) 137 CLR 208

The Commonwealth v Baume (1905) 2 CLR 405

Toronto Suburban Railway Co v Toronto Corporation [1915] AC 590

Yanner v Eaton (1999) 201 CLR 351

Yarmirr v Northern Territory (2001) 208 CLR 1
The Honourable Justice Kenneth Hayne AC, *Statutes, Intentions and Courts: What Place Does The Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?* (2014) 13(2) Oxford Commonwealth Law Journal, 271

Applicant: THI HUE NGUYEN

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: MLG 1751 of 2015

Judgment of: Judge Wilson

Hearing date: 15 December 2017

Date of Last Submission: 15 December 2017

Delivered at: Melbourne

Delivered on: 25 January 2018

REPRESENTATION

Counsel for the Applicant: Mr A. Solomon-Bridge

Solicitors for the Applicant: Victoria Immigration Lawyers

Counsel for the First Respondent: Ms C. Symons

Solicitors for the First Respondent: DLA Piper Australia

ORDERS

- (1) Leave to bring and rely on proposed ground 4 is refused.
- (2) Grounds 1, 2 and 3 of the application filed on 29 July 2015 are dismissed.
- (3) The applicant pay the costs of the first respondent.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1751 of 2015

THI HUE NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The issue in this case was whether the applicant was the spouse of her sponsoring partner when the Migration Review Tribunal, now the Administrative Appeals Tribunal (“the Tribunal”), made its decision on 30 June 2015. The applicant needed to satisfy regulation 801.221 of the *Migration Regulations 1994* (Cth) in order to meet the criteria for the grant of a partner (residence) (class BS) (subclass 801) visa. The Minister’s delegate considered that the applicant did not meet the criteria. The Tribunal took the view that the requirements of s.5F(2)(d) of the *Migration Act 1958* (Cth) (“the Act”) were not satisfied and therefore the applicant did not demonstrate the existence of a married relationship.

2. The question in this case was whether the Tribunal fell into jurisdictional error in its decision that the applicant should not be granted the relevant visa.

Synopsis

3. For the reasons that follow, in my judgment the Tribunal did not fall into jurisdictional error. In my view, the decision of the Tribunal was correct. This application for judicial review should be dismissed.

Factual overview

4. On 27 January 2011 the applicant applied for the visa on the basis that she was in a spousal relationship with an Australian resident, the sponsor, who supported the visa application in this case. On 21 April 2011 the applicant was granted a subclass 820 partner (temporary) visa.
5. The applicant's sponsor was incarcerated in prison in July 2011. An appearance was scheduled on 20 September 2013.
6. The Minister's delegate considered the material submitted by the applicant and decided that the applicant did not meet the definition of "spouse". Most important among the delegate's reasons were the following –
 - a) the applicant and the sponsor were not in a genuine and continuing relationship as the sponsor had spent 21 months prior to the delegate's decision in prison;
 - b) during that 21-month period of incarceration the applicant visited the sponsor on two occasions only, one visit of which was made after the delegate raised the matter during a telephone interview;
 - c) the delegate was not satisfied the applicant and the sponsor maintained a joint household or were committed to a spousal relationship as evidenced by the fact that the applicant did not attend her sponsor's court hearing nor did she respond to his letters and the telephone calls between the two were of a minute's duration; and

- d) the delegate was not satisfied that the applicant and the sponsor provided each other with companionship and emotional support or that the two had a joint commitment to a shared life.
7. The delegate decided not to grant the applicant the visa she sought.
 8. Being dissatisfied with the decision of the delegate, the applicant sought a merits review of her visa application in the Tribunal by application filed 5 June 2014. On that day the Tribunal invited the applicant to attend the hearing scheduled for 23 April 2015 and the Tribunal requested the applicant to provide any additional relevant material by 16 April 2015.
 9. On 23 April 2015 the applicant attended the Tribunal hearing. During the hearing the applicant's migration agent submitted additional documents to the Tribunal that included evidence of correspondence between the applicant and her sponsor and evidence that the applicant had visited the sponsor five times between June 2014 and March 2015. The Tribunal took evidence from the applicant, the applicant's sponsor (by video link from prison in New South Wales) and from a witness.
 10. On 7 May 2015 the applicant's migration agent provided a written response to the concerns raised by the Tribunal during the hearing.
 11. On 30 June 2015 the Tribunal decided to affirm the delegate's decision not to grant the applicant a partner (residence) (class BS) visa. As an attachment to its reasons, the Tribunal reproduced clause 1.15A of the regulations especially the matters to be taken into account when the Minister was considering (as was this case) a partner (residence) (class BS) visa, those being set out in clause 1.15A(3) of the regulations namely, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the commitment to each other. The Tribunal addressed each.
 12. So far as the financial aspects of the relationship between the applicant and her sponsor were concerned, the Tribunal observed that the applicant and the sponsor gave contradictory evidence about the sponsor's business prior to his incarceration.
 13. So far as the nature of the applicant's and the sponsor's household was concerned, the Tribunal found that by reason of the sponsor's

incarceration from July 2012, the two did not maintain a household together.

14. As to the social aspects of the applicant's and the sponsor's relationship, the Tribunal referred to statutory declarations from two persons but gave those declarations little weight by reason of errors or irregularities in the information in those declarations.
15. So far as the nature of the commitment to each other was concerned, the Tribunal considered that various matters raised significant doubts about whether the parties had a mutual commitment to one another to the extent contemplated in the regulations. Among the matters of concern were the following –
 - a) the applicant did not attend the sponsor's court hearing;
 - b) she visited the sponsor once in 21 months between his incarceration in July 2012 and October 2013;
 - c) the applicant said she visited the sponsor five times in the period June 2014 in March 2015; and
 - d) the level of involvement showed by the applicant to the sponsor was less than was to be expected by a couple in a genuine married relationship.
16. The Tribunal was not satisfied on a critical factor. It said it was not satisfied that –

*at the time of decision the applicant and the sponsoring partner had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is not satisfied that the relationship is genuine and continuing at the time of its decision. The applicant therefore does not meet the requirements of s5F(2)(b) and (c) for a married relationship.*¹
17. The Tribunal found as an additional matter that it was not satisfied that –

¹ Court book filed on 29 September 2015, p.297 at [38].

at the time of decision the applicant and the sponsoring partner live together or do not live separately and apart on a permanent basis.²

18. The Tribunal found that at the time of the decision the applicant was not a spouse of the sponsoring partner within the meaning of s.5F of the Act, who is the person who was specified as the applicant's spouse in the subclass 820 application.
19. As a result, the Tribunal found that the applicant did not meet clause 801.221(2)(c) and therefore did not meet the prescribed criteria in clause 801.221(1) of the regulations.
20. The Tribunal affirmed the decision not to grant the applicant the visa she sought.

In this court

21. By initiating application filed on 29 July 2015, the applicant sought judicial review of the decision of the Tribunal. She relied on three grounds. They were as follows (errors in original) –

1. The Second Respondent committed jurisdictional error by identifying a wrong issue or asking a wrong question. Particulars:

a) The Second Respondent treated reg 1.15A of the Migration Regulations 1994 (Cth) as creating a threshold which the applicant had to meet, rather than as merely containing matters which it was obliged to consider in determining whether one or more of the conditions in paragraphs 5F(2)(a), (b), (c), or (d) of the Migration Act 1958 (Cth) existed.

2. Further or alternatively, the Second Respondent committed jurisdictional error by identifying a wrong issue or asking a wrong question and/or came to an irrational or illogical conclusion. Particulars:

a) The Second Respondent treated evidence of the relationship as it stood around the time of July 2012 – October 2013 as of equal or greater weight compared with the contemporary evidence of the relationship around the time of June 2014 – March 2015, in

² Court book filed on 29 September 2015, p.297 at [39].

circumstances where the Second Respondent needed only to be satisfied of the existence of a married relationship (as defined in s 5F of the Migration Act) as at the time of its decision on 30 June 2015.

3. Further or alternatively, the Second Respondent committed jurisdictional error by coming to an irrational or illogical conclusion. Particulars:

a) There was no rational or logical basis for the Second Respondent to conclude that the applicant and the sponsor were to live separately and apart on a permanent basis following his release from prison.³

22. Two things must be said of the grounds. First, even though the particulars subjoined to each paragraph of the grounds had an alphabetical letter “a”, none had any following particular “b”. Second, even though three grounds were set out in the initiating application, four grounds were advanced in fact, the fourth being contained in the applicant’s written submissions. No leave was given to advance that fourth ground. Counsel for the applicant conceded that he needed, and sought, leave to argue the fourth ground. On behalf the Minister, Ms Symons indicated leave should be refused as ground 4 had no merit. In the passages below I have addressed the merits of ground 4.

23. Before turning to each ground let me say how efficiently the hearing of this case was conducted by counsel. Each proceeded on the basis of the indication I had given that I had read the material on which each relied, including authorities and as result each counsel addressed the main matters that fell for specific mention. They conducted this hearing akin to the way counsel proceeds in a hearing of an application for the grant of special leave to appeal to the High Court of Australia. As a result, both counsel said all they wished to say inside of 30 minutes. I wish to record my gratitude to counsel for that time effectiveness. Notwithstanding, the grounds raised difficult issues, as the passages below reveal.

Ground 1

24. At its heart, under the first ground the applicant contended that the Tribunal asked itself a wrong question and thereby fell into

³ Application filed on 29 July 2015 at p.3.

jurisdictional error by treating regulation 1.15A of the regulations as creating a threshold that the applicant had to meet rather than treating that regulation as a list of matters that the Tribunal had to consider.

25. In his written submissions, counsel for the applicant recognised that the matters that had to be considered for the purposes of regulation 1.15A of the regulations were mandatory. He provided the following written submissions –

It will be noted from the above that, for consideration of the grant of a subclass 801 visa, the matters in reg 1.15A(3) are mandatory relevant considerations, but no more. That is to say, the decision-maker is required to consider those matters on the way to reaching an opinion about whether the matters in s 5F are satisfied, but the regulation itself does not circumscribe or otherwise control the elements of the definition of “spouse” as it appears in s 5F of the Act.⁴

26. In his verbal submissions before me, counsel for the applicant contended that the Tribunal “*elevated what are mandatory relevant considerations in the regulations to touchstones of a spousal relationship under the Act*”.⁵
27. The plane gravamen of the applicant’s position in respect of ground 1 was that s.5F of the Act defined “spouse” yet regulation 1.15A of the regulations impermissibly controlled that definition.
28. I do not agree.
29. The starting point in the analysis is the language of the legislation itself. As I have said many times previously (for example, in *Deputy Commissioner of Taxation v Webb*⁶ and *Commissioner of State Revenue v Kimiora*⁷) legislation is to be construed in such a way that it is the primacy of the words used in the legislation itself that determines the proper construction of the legislation. Since the decision of the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (“*Project Blue Sky*”),⁸ Australian law has held that the primary object of statutory construction is to construe the

⁴ Applicant’s outline of submissions filed on 2 November 2017 at [21].

⁵ Transcript of proceedings, 15 December 2017 at p.3.

⁶ (2017) 320 FLR 371.

⁷ (2016) 309 FLR 266.

⁸ (1998) 194 CLR 355.

relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute.⁹ That much is consistent with the observations of Barwick CJ in *Taylor v Public Service Board (NSW)*.¹⁰ According to Lord Scarman's speech in the House of Lords in *Southwest Water Authority v Rumble's*¹¹ as well as the observations of Wilson and Mason JJ in *Cooper Brooks (Wollongong) Pty Ltd v Commissioner of Taxation*,¹² the meaning of a particular legislative provision must be determined by reference to the language of the instrument viewed as a whole. The context, the general purpose and policy of the provision of a piece of legislation as well as its consistency and fairness are surer guides to meaning than is the topic with which the legislation is constructed.¹³ As was held in *Toronto Suburban Railway Co v Toronto Corporation*,¹⁴ *Minister for Lands (NSW) v Jeremias*¹⁵ and *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*,¹⁶ the process of construction must always begin with an examination of the context of the provision that is being construed.

30. High Court authority of very long standing has prescribed that a court construing a statutory provision must strive to give meaning to every word of the relevant provision. So much was held in *The Commonwealth v Baume*¹⁷ as well as in *Chu Kheng Lim v Minister for Immigration*.¹⁸ No sentence, clause or word is superfluous, void or insignificant if by any other construction they may all be made useful and pertinent.¹⁹
31. In *Project Blue Sky* the majority pointed out that the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended those words to have.²⁰ Ordinarily, that meaning will correspond with the grammatical meaning of the relevant provision.

⁹ (1998) 194 CLR 355 at [69].

¹⁰ (1976) 137 CLR 208.

¹¹ [1985] AC 609.

¹² (1981) 147 CLR 297.

¹³ (1998) 194 CLR 355 at [69].

¹⁴ [1915] AC 590,597.

¹⁵ (1917) 23 CLR 322.

¹⁶ (1985) 157 CLR 309.

¹⁷ (1905) 2 CLR 405, 414 and 419.

¹⁸ (1992) 176 CLR 1, 12.

¹⁹ *R v Berchet* [1794] EngR 1806.

²⁰ (1998) 194 CLR 355 (at [78]).

32. More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,²¹ the majority (Hayne, Heydon, Crennan and Kiefel JJ) held that the task of statutory construction must begin with a consideration of the text itself and that historical considerations and extrinsic material cannot be relied upon to displace the clear meaning of the text.²² Other decisions of the High Court reflect similar reasoning such as *Yanner v Eaton*,²³ *Yarmirr v Northern Territory*,²⁴ *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*,²⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment*,²⁶ *Carr v Western Australia*,²⁷ *Director of Public Prosecutions for Victoria v Le*²⁸ and *Northern Territory v Collins*.²⁹
33. In many respects, modern Australian jurisprudence on the subject of statutory interpretation has placed former High Court Justice, the Honourable Justice Kenneth M Hayne, at the vanguard. His extra-judicial writing on point is illuminating – the Honourable Justice Kenneth Hayne AC, *Statutes, Intentions and Courts: What Place Does The Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?*³⁰
34. In s.5F(3) of the Act, the legislation expressly contemplated the creation of subsequent subordinate legislation in the form of regulations that made provision for determining whether one or more of the conditions in ss.5F(2)(a), (b), (c) or (d) of the Act existed. Proceeding in the approach recorded above that every word of legislation is presumed to have been intended to play a role, the proper construction of s.5F(3) of the Act is that Parliament intended that the regulations would more fully set out how the matters recorded in ss.5F(2)(a), (b), (c) and (d) of the Act were to be determined. Mr Solomon-Bridge contended that such a step had the effect of elevating the regulations in clause 1.15A of the regulations to “touchstones”. The use of the concept “elevating” is a little theatrical

²¹ (2009) 239 CLR 27.

²² (2009) 239 CLR 27 at [47].

²³ (1999) 201 CLR 351, 366 (at [17]).

²⁴ (2001) 208 CLR 1, 38–39 (at [13]–[14]).

²⁵ (2001) 207 CLR 72.

²⁶ (2005) 224 CLR 193.

²⁷ (2007) 232 CLR 138.

²⁸ (2007) 232 CLR 562.

²⁹ (2008) 235 CLR 619.

³⁰ (2014) 13(2) Oxford Commonwealth Law Journal, 271.

and the conversion of the elements of regulation 1.15A into “touchstones” is infelicitous, to say the least. Regulation 1.15A of the regulations does no more than provide detail to the matters to be determined for the purposes of ss.5F(2)(a), (b), (c) and (d) of the Act. When one examines regulation 1.15A(3), far from those matters being “touchstones”, they are no more than matters included in any consideration of “financial aspects”, “nature of the household”, “social aspects of the relationship” and “the nature of the persons’ commitment to each other”. All of the issues listed in roman numeral subparagraphs are preceded by the word “including”.

35. In developing his contention that regulation 1.15A “controlled” (his word) the elements of the definition of “spouse”, Mr Solomon-Bridge submitted the many of the considerations in regulation 1.15A of the regulation were “agnostic” (again, his word) as to whether the particular matter existed in the relationship. He submitted in paragraph 24 of his written submissions dated 1 November 2017 that regulation 1.15A imposed a “further threshold for the applicant to overcome ... rather than as simply prescribing a list of mandatory relevant considerations to which [the Tribunal] was obliged to have regard”.
36. In my view, that submission misstated the combined operation and effect of s.5F of the Act with regulation 1.15A of the regulations.
37. As is regularly the case in federal legislation, Parliament confers by subordinate legislation, relevantly regulations, the power to make provision for the minutiae of a particular set of circumstances. In this case, s.5F(2) of the Act made provision for the matters to be considered in assessing whether two persons were in a “married relationship”, as defined. Then, in subsection 5F(3) of the Act, Parliament enacted a provision that stated that subordinate legislation could specify whether one or more of the conditions in subsections 5F(2)(a), (b), (c) or (d) existed. Far from that “controlling” the elements of the definition of spouse, subsection 5F(3) of the Act did little more than make express provision for the way in which each of the broad and somewhat nebulous matters in subsections 5F(2)(a), (b), (c) and (d) were to be demonstrated or “determined”, as s.5F(3) of the Act provided.

38. Taking s.5F(2)(b) of the Act as an example, minds would inevitably differ about whether in the facts of any given case two people had a “*mutual commitment to a shared life*”. With a view to assisting in the “*determination*” (as s.5F(3) of the Act spoke) of that issue, regulation 1.15A of the regulations became operative.
39. When reading regulation 1.15A fairly, regulation 1.15A(2) compels the Minister to consider all the circumstances of the relationship. To that is added “*including the matters set out in sub-regulation (3)*”. In other words, when the Minister is dealing with a partner (residence) (class BS) visa, as was this case, the Minister was required to consider all the circumstances of the relationship. When undertaking that consideration, the Minister was required to take into consideration the matters set out in sub-regulation (3). That did not somehow work the alchemy of transforming the elements of sub-regulation 1.15A (3) into factors that “*controlled*” the definition of “*spouse*”. To the contrary. Once one passed through the elements of s.5F(2) of the Act and one then moved to regulation 1.15A of the regulations, one of the most important elements – although by no means the controlling element – was “*all the circumstances of the relationship*”. In other words, no single feature of the relationship was determinative. True, the matters set out in sub-regulation 1.15A(3) had to be taken into account but none was, in and of itself, the sole determining factor.
40. I do not accept the applicant’s principal point in relation to ground 1. As a matter of statutory construction the submission missed the point. In my view the regulations did not “*control*” the definition of “*spouse*” or of “*married relationship*”.
41. The Tribunal correctly pointed out that it was required to have regard to all the circumstances of the relationship. In embarking on a consideration of the matters enumerated in regulation 1.15A(3) of the regulations, the Tribunal undertook a consideration of the matters it was required to consider, especially as the matters between paragraphs 29 to 38 of the Tribunal’s reasons were to be included in the Tribunal’s consideration of the circumstances of the case.
42. I detected no error in the Tribunal doing as it did.
43. In my view, ground 1 was without merit.

Ground 2

44. Expressed most basically, under ground 2 the applicant contended that she was required to satisfy the Tribunal about aspects of the marriage relationship at the time of the Tribunal's decision on 30 June 2015 and that the Tribunal erroneously concerned itself with evidence of the applicant's relationship with the sponsor in July 2012, three years earlier.
45. In developing the argument in relation to ground 2 counsel for the applicant focused on paragraph 37 of the Tribunal's reasons. It is utile to record that paragraph in its entirety as follows –

In considering the issue of commitment the Tribunal is most concerned that the applicant did not attend the sponsor's court hearing and that she visited him in jail once in the 21 months between his incarceration in July 2012 and October 2013. She is then said to have visited him 5 times between June 2014 and March 2015. The Tribunal acknowledges that there is evidence that the applicant booked accommodation near the prison where the sponsor is held and took part in the sponsor's day leave. Nevertheless the Tribunal considers that the level of involvement is far less than it would expect for a couple in a genuine married relationship. In conclusion the Tribunal considers that these concerns raise significant doubt as to whether the parties have a mutual commitment to one another to the extent contemplated in the Regulations.

46. Counsel to the applicant argued that the only relevant time for the Tribunal was the date of its decision (30 June 2015) and therefore events in July 2012, October 2013, June 2014 and March 2014 were beside the point.
47. I do not agree.
48. The Tribunal was entitled to consider, among others, the matters recorded in regulation 1.15A(3)(d)(i) and (ii) of the regulations. In other words, the Tribunal was entitled to consider a variety of matters including the duration of the relationship as well as the length of time the parties lived together. Any such consideration had to be given at the time of the Tribunal's decision. However, by definition the phrase "*duration of the relationship*" introduced a consideration of the antecedent period over which the relationship inured. Similarly,

the phrase “*the length of time during which the persons have lived together*” involved an examination of the period of time, obviously prior to the Tribunal’s decision, during which the parties lived together. Of necessity, that involved an historical examination of events. To construe regulation 1.15A(3)(d)(i) and (ii) otherwise would serve to thwart the plain legislative intendment of regulation 1.15A(3)(d) of the regulations. In my view, that is not the way legislation and subordinate legislation should be construed, as the authorities cited above make perfectly plain.

49. It seemed to me the Tribunal made no error, whether on the basis that it asked itself a wrong question or on the basis of legal unreasonableness, as asserted under ground 2. In my view, that Tribunal did as it was entitled do having regard to the nature and effect of regulation 1.15A(3)(d) of the regulations.

50. Ground 2 failed.

Ground 3

51. In a nutshell, the applicant contended that the Tribunal fell into jurisdictional error in its conclusion in paragraph 39 of its reasons. There, the Tribunal found as follows –

Additionally, the Tribunal is not satisfied that at the time of decision the applicant and the sponsoring partner live together or do not live separately and apart on a permanent basis.

52. The applicant’s written submissions forcefully advanced the notion that no evidence was before the Tribunal to the effect that the sponsor would have had any accommodation upon his release from prison other than his former residence in St Albans. In verbal submissions, Mr Solomon-Bridge put the point as follows –

There was a whole body of evidence about that fact. Now, whether – there was no evidence or no suggestion that he had somewhere else to live after being paroled, and to find that they weren’t going to live together after his parole was not only against the wave of evidence, but not open. It simply – and there’s no reasoning to support it.³¹

³¹ Transcript of proceedings, 15 December 2017 at p.5.

53. At once it must be pointed out that paragraph 39 of the Tribunal's reasons said nothing about events after the sponsor's release from prison. The reasoning in paragraph 39 proceeded on the basis that the applicant failed to meet the criteria in s.5F(2)(d) of the Act as at the date of the decision, 30 June 2015. That much was made plain in the preceding paragraph 38 and by the conjunctive use of the phrase "*additionally*" by way of commencement of paragraph 39.
54. It seemed to me that a valid factual basis did exist for the conclusion expressed in paragraph 38 of the Tribunal's reasons as well as for the conclusion expressed in paragraph 39.
55. In my view, ground 3 failed.

Ground 4

56. It will be recalled that the applicant required leave to argue ground 4. Ms Symons opposed the grant of leave on the basis that no useful purpose would be served by the grant of leave because the ground was without merit, so she said.
57. Both arguments required at least some examination of the factual substratum of the ground. Let me first record the proposed ground 4 as it appeared in the written submissions filed by Mr Solomon-Bridge. It was as follows –

4. Further or alternatively, the Second Respondent committed jurisdictional error by failing to consider all the applicant's claims and/or their component integers.

Particulars

*The Second Respondent failed to consider the claims made in the statutory declarations of Thai-Ha Nguyen and Lan Thu Tran.*³²

58. Before going to the material in the statutory declarations, it is useful to record what a tribunal must consider when addressing an applicant's claims. The point is not new. I addressed it in *BCF15 v Minister for Immigration and Border Protection*,³³ ironically a case in which Mr Solomon-Bridge appeared opposed to Ms Symons, as was the case

³² Applicant's outline of submissions dated 1 November 2017 at [34].

³³ [2016] FCCA 2340.

in this case. In *MZANX v Minister for Immigration and Border Protection*³⁴ I addressed what the phrase “*integer of claim*” contemplated. A similar analysis was undertaken in *ACX15 v Minister for Immigration and Border Protection*.³⁵ For the purposes of brevity, I shall not repeat what I said in those decisions except to say that in each I examined in detail the legal aspects of a “*claim*” as well as an “*integer of claim*”. For the purposes of the decision in this case, I have applied the legal analysis that I recorded in those decisions.

59. The question raised by proposed ground 4 was whether the claims and integers of claims made in the statutory declarations of Thai-Ha Nguyen and Lan Thu Tran were considered by the Tribunal. On behalf of the applicant, Mr Solomon-Bridge argued in his written submissions that the Tribunal either overlooked the statutory declarations or it failed to give active intellectual consideration (at least, I inferred that was his point when he submitted that the Tribunal “*failed to consider [the claims] in the necessary sense*”)³⁶ to the matters raised in those statutory declarations.
60. Two statutory declarations bore upon this proposed ground. Each was made on 20 December 2010, four-and-a-half years prior to the Tribunal’s decision on 30 June 2015. In the statutory declaration of Thai-Ha Nguyen, the declarant stated he saw that the sponsor and the applicant were “*very much in a genuine relationship*” and that they were “*living together as a married couple*” (his words). In the opinion of the declarant the sponsor and the applicant were “*in a relationship that will go on for a long time*”.³⁷ The second statutory declaration was made by Lan Thu Tran. After giving details of how the declarant lived near the applicant, the declarant stated that it was the declarant’s belief that the applicant’s and the sponsor’s relationship was genuine. The declarant offered a belief that the sponsor’s and the applicant’s marriage would be long and successful.
61. A close comparison of the two statutory declarations revealed that they appeared to be in the same handwriting and they covered essentially the same information – the length of time the declarant had known the

³⁴ (2016) 314 FLR 461.

³⁵ (2017) 322 FLR 247.

³⁶ Applicant’s outline of submissions dated 1 November 2017 at [38].

³⁷ Court book filed on 29 September 2015 at p.41.

applicant and the sponsor, a belief as to the genuineness of their relationship and a prognosis about the future of the marriage. So far as the cogency of the material in those statutory declarations was concerned, it was open to a reader to conclude that the information in them was lightweight. As the Minister pointed out, the declarations addressed events over four years earlier than the date of the Tribunal's decision. In addition, it seemed to me that there was real merit in the Minister's submission that the statutory declarations contained no detail about the nature of the applicant's relationship with the sponsor and no detail about the evolution of that relationship, whether between the date when the declarant met the applicant or sponsor to the date on which the declarations were made (20 December 2010) or otherwise.

62. It was unremarkable that the Tribunal made no reference to those two statutory declarations. They contained next to no useful material. The Tribunal was not obliged to refer to each and every piece of information put before it.
63. In my view, the Tribunal did not fall into error in failing to refer to the two statutory declarations made on 20 December 2010. Neither added anything probative to the matters the Tribunal needed to consider.
64. In reaching that conclusion, it seemed to me that proposed ground 4 was destined to fail. No useful purpose would be served in granting leave to bring it out of time. In those circumstances, I refuse leave to bring and rely on ground 4.
65. The orders I make are as follows –
 - a) leave to bring and rely on proposed ground 4 is refused;
 - b) grounds 1, 2 and 3 of the application are dismissed;
 - c) the applicant is to pay the Minister's costs.

I certify that the preceding sixty-five (65) paragraphs are a true copy of the reasons for judgment of Judge Wilson

Associate:

Date: 25 January 2018